UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

SAVERA INDUSTRIES, INC., SUPERIOR BUILDING SERVICES, INC. D/B/A SAVERA INDUSTRIES, INC., SUPERIOR CLEANING SERVICES D/B/A SAVERA INDUSTRIES, INC., a Single Employer, and INDUSTRIAL STEAM CLEANING OF LONG ISLAND, a Joint Employer

Respondents

and **Case 29-CA-193068**

PERVIS WILLIAMS, an Individual

Charging Party

Colleen Breslin, *Esq.*, for the General Counsel.
Joseph Carbonaro, Esq., for the Respondent.

DECISION

Statement of the Case

BENJAMIN W. GREEN, Administrative Law Judge. This case was tried before me in New York, New York on November 1, 2, and 3, 2017.[1] The complaint in this case issued on August 3, 2017. The Respondents filed an answer on August 21, 2017. At hearing, the parties amended the pleadings to eliminate certain Respondents and admit the single and joint employer status of the remaining Respondents.[2] The Respondents also amended their answer to admit the supervisory status of Kendall Harrington, Cherry Ann Mellad, and Earl Mellad.[3] The complaint alleges that the Respondents discharged and have refused to reinstate Charging Party Pervis Williams because of his protected concerted activity. The complaint further alleges that the Respondents, by Earl, threatened to report Williams to the police for engaging in protected concerted activity. As discussed in detail below, I find that the Respondents unlawfully discharged Williams, but did not unlawfully threaten him with arrest.

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[1] All dates refer to 2016 unless stated otherwise herein.

[2] Savera Industries, Inc., Superior Building Services, Inc. d/b/a Savera Industries and Superior Cleaning Services d/b/a Savera Industries (collectively Respondent Savera) were successive corporations that admittedly constitute a single employer. Industrial Steam Cleaning of Long Island (Respondent Industrial) was a contractor of and admittedly a joint employer with Respondent Savera. Respondent Savera and Respondent Industrial are referred to collectively herein as "the Respondents."

[3] Since Cherry Ann Mellad and her husband Earl Mellad were both called as witnesses in this case, I refer to them herein by their first names instead of their last names in order to avoid confusion.

On the entire record, including my observation of the demeanor of the witnesses, and after considering post-hearing briefs that were filed by the General Counsel and the Respondents, I make these

Findings of Fact[4]

I. Jurisdiction

The parties agree and I find that each of the Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

DO & CO is a food caterer for the airlines with a facility located at 149-32 132nd Street, Queens, New York. The Respondents provide maintenance and cleaning services for DO & CO at this facility, including dish washing, garbage removal, and other janitorial services. DO & CO and the Respondents run a 24-hour operation seven days per week. [Tr. 15, 244, 275-278, 347] [GC 1]

Harrington has an ownership interest in Respondent Savera. In 2012, Respondent Savera lost the contract with DO & CO to a competitor called Busy Bee, but successfully rebid the contract a year later. Respondent Industrial is owned by Harrington's wife, Kimarie Wright. [Tr. 371, 406-411, 430]

Respondent Savera employs an account manager who is the highest manager for that company at that DO & CO facility. Harrington does not work at the DO & CO facility on a regular basis and leaves most of the management of the day-to-day operation to the account manager. In 2015, Respondent Savera's account manager was Alvin Wilson. Wilson left the company in September 2016 and was replaced by Cherry, the current account manager. [Tr. 230-232, 254, 348, 421, 460]

Williams was initially hired by Respondent Savera for the position of non-halal pot wash when Harrington first obtained the DO & CO contract in about 2009. Busy Bee retained Williams when that company won the contract in 2012 and Respondent Savera retained

[4] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather upon my review and consideration of the entire record of this case. My factual findings are based in part on credibility determinations and, in this decision, I have credited some but not all of the testimony of certain witnesses. Credibility findings need not be all-or-nothing propositions and, indeed, it is common in judicial proceedings to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, 335 NLRB 622 (2001). A credibility determination may rely on a variety of factors, including the context of the testimony, the witness's demeanor, and the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003).

Williams when it successfully rebid the contract thereafter. Williams worked the day shift from 5:00 a.m. to 1:30 p.m. on the first floor of the facility.[5] [Tr. 62-68, 409-410]

Seraphine Paul cleaned the offices of the DO & CO facility. She started working at the facility in about 2013 for a contractor of Respondent Savera and was subsequently hired directly by Respondent Savera in about 2014. The offices that Paul cleaned were largely located on the second floor and she worked the afternoon-evening shift from 1:30 p.m. to 9:30 p.m. Paul testified that she often saw and greeted Williams when he was leaving work at the end of his shift and she was arriving at work for the start of her shift. [Tr. 15-17, 23, 37, 39, 51]

Wilson testified that, in late-2015, he wanted to fire Williams because a DO & CO supervisor reported that Williams had been drinking alcohol on the job.[6] However, Harrington directed Wilson not to fire Williams because Williams was one of his best employees. Harrington clarified at trial that he considered Williams one of his best employees because he was available to work whenever he was needed and the non-halal pot wash area where Williams worked was always under control. After this incident, Harrington moved Williams from the payroll of Respondent Savera to the payroll of Respondent Industrial in order to shield Williams from termination by Wilson (who only had authority to terminate employees of Respondent Savera). Although Williams was placed on the payroll of Respondent Industrial, he continued to be supervised by Respondent Savera.[7] [Tr. 351, 372, 412-416]

The Respondents did not have a practice of giving employees written warnings and, according to Harrington, rarely fired employees unless they did something "really crazy." [Tr. 461-63] However, Harrington testified that it was extremely important for the Respondents' employees to follow DO & CO rules because a failure to do so could result in the loss of the contract and DO & CO was Respondent Savera's only client. [Tr. 406-7] Harrington further testified that drinking alcohol on the job was against DO & CO rules. [Tr. 426-427]

Debbie Lyn, a p.m. supervisor for Respondent Savera, testified that, on two occasions in about mid-2016, Williams touched her inappropriately and made inappropriate sexual comments to her. Lyn asked Cherry to tell Williams his conduct was inappropriate and making her uncomfortable. Cherry testified that Lyn did report that Williams made an inappropriate comment about the way she (Lyn) looked, but that she (Cherry) did not speak to Williams about it. [Tr. 237, 361-364]

Cherry testified that she talked to Williams on a number of occasions about arriving on time and sitting in the cafeteria instead of starting work. According to Cherry, on some of these occasions, Williams raised his voice in responding. Cherry testified that, one time, Williams used an obscene Jamaican word in referring to her as a piece of crap or piece of cloth used to

[5] Initially, Williams' shift was 4:00 a.m. to 12:30 p.m., but it was changed at some point to 5:00 a.m. to 1:30 p.m. The Respondents have two pot watch shifts. The second or evening shift starts at 2:00 p.m. [Tr. 153-54]

[6] The Respondents also entered into evidence a written warning which purports to confirm a discussion Cherry had with Williams about drinking alcohol in the work area on November 7. [R 2] Williams denied he ever drank alcohol on the job and that he was ever accused of doing so by management. [Tr. 133-134, 497, 499]

[7] Respondent Industrial employed Williams, but had no other presence or business at the DO & CO facility. Wright does not work at the facility and Respondent Industrial is largely engaged in an unrelated business. [Tr. 371-373, 392, 397]

wipe your behind. Cherry told Williams that her husband is Jamaican and she understood what he had called her. Nevertheless, Cherry testified that Williams "is a lovely man, I respect him very much." [Tr. 232-237, 280-287]

Cherry testified that she was present on an occasion when Williams became loud in response to a supervisor named Lorraine who told him he was taking an excessive break. Williams allegedly told Lorraine she did not need to tell him that because he had been with the company long enough. Cherry told Williams he could have said this to Lorraine more politely instead of "embarrassing her in the crowd amongst everybody that was in the cafeteria, because it was just an open forum." [Tr. 233-234]

Cherry and Lyn indicated that they tended to excuse Williams' conduct because he is elderly and they did not want him to be fired. Cherry also stated that Williams was a working man who needed his job and they had a "tight nit" group of employees. Harrington indicated that he was particularly protective of Williams and testified, "that's my only sin, that I can't bring myself to fire him." Harrington explained that he "was really in some tight positions, like getting guys to come in and work, or so forth, Mr. Williams, I'd call him up. He never said no to me." [Tr. 284-287, 360-364, 429]

On about October 6, Paul attended a meeting of the night shift that was held by Lorraine and another supervisor named Landry. Lorrain told employees she would notify Harrington if they continued to take more than 30 minutes for lunch and that employees would have their pay docked accordingly. Paul responded that this was not fair because a supervisor might not see an employee who was working in a different area of the building. Paul said she works in different areas and that she could not be written up or docked just because a supervisor came upstairs and did not see her for five minutes. Other employees echoed her remarks. Paul asked to be and was excused early from this meeting so she could return to work. [Tr. 32-34]

On about October 7, Cherry called Paul and asked what happened at the meeting the previous night. Paul told her what happened. After this call, Cherry sent Paul a text indicating that she was fired for being rude to supervisors. Paul thought Cherry was joking and went to work the next day. When Paul arrived for work on October 8, Cherry asked what she was doing there and said Harrington did not want Paul working there anymore because she was always rude. Paul told Cherry she would be contacting the Labor Department. [Tr. 34-35]

According to Harrington, Cherry notified him that she discharged Paul for being belligerent at a meeting in saying it was not a big deal for employees to be off the floor beyond their 30 minute breaks. Harrington testified that it was a big deal and that Paul had no reason for the outburst since "she didn't work on the floor." [Tr. 424-426]

Cherry testified that, in October, she offered Williams a new runner position which was suggested by DO & CO. The runner would be responsible for moving pots in and out of the pot wash area. Cherry claims she offered Williams the runner position because she had received complaints that his work as a pot washer was slow. Williams rejected the runner position and was not discharged in October. Cherry testified that she "never pushed the issue after that" and did not intend to force Williams to take a job he did not want. Harrington testified that he talked to Cherry about moving Williams from pot washer to runner on only one occasion and this conversation took place about a week or two before Williams left the company. According to Harrington, he had not previously heard about any complaints from DO & CO about Williams. Harrington testified that he never discussed with Cherry the possibility of terminating Williams' employment if he did not accept the runner position. [Tr. 293-295, 433-35]

According to Cherry, she always picks up employees' paychecks and distributes them on Friday. Cherry testified that she leaves between noon and 1:00 p.m. to pick up the checks in Queens, New York, and returns by about 2:00 p.m. Generally, she hands out the checks to employees outside the building. Cherry testified that Williams sometimes left before she returned with his check and, on these occasions, she gave him his check the next day he worked (normally Monday). Cherry, Wilson and Harrington testified that employees never complained about receiving their paychecks late. [Tr. 238-243, 256, 349-350, 431-433]

The record contains Williams' paychecks from September to November, which are Chase Bank checks with the date of issue printed on them by the bank. Each check is dated with a date that was a Friday.[8] The Respondents also introduced bank records for September and October which show the dates of fund transfers to their payroll company, Paychex. [Tr. 89, 238-43] [GC 3; R 3-4]

Williams and Paul testified that employees were not always paid on Friday. According to Williams, since the beginning of his employment at the DO & CO facility, employees were paid late once or twice per month. According to Paul, employees were not paid on Friday "many times." Paul testified that, on these occasions, employees were told they would not be paid on time because the Respondents were not paid by DO & CO or because an emergency caused the office secretary to be out. Williams and Paul testified that either all the employees were paid on Friday or none were paid on Friday, and that everyone complained to management when they were not paid on time. [Tr. 28-30, 53-55, 120-121, 135-139, 148].

On November 18, Williams and his sister-in-law Hazel Cunningham attended a meeting in Queens, New York with Meetu Dhar, Esq., an attorney with the CUNY Citizenship Now program. Cunningham arranged the meeting and drove Williams to it. [Tr. 74-81] Williams and Cunningham testified that the meeting started at about 10:00 a.m. and took about 2-½ hours. They stopped briefly at a supermarket on the way home, and arrived back at Williams' house at about 2:00 p.m. Cunningham specifically recalled looking at the time in her car when she dropped Williams off because it was 2:00 p.m. and she had to pick up her grandchildren from the school bus at 2:30 p.m. Cunningham picks up her grandchildren at the school bus every day at 2:30 p.m. [Tr. 496] Williams testified that, when he arrived home from the meeting with Dhar, he relaxed and cooked. According to Williams, at about 3:00 p.m., he left to pick up his paycheck and arrived at the DO & CO facility around 5:00 p.m. Williams takes three buses to get to work. [Tr. 80-83]

Upon arriving at work, Williams took the elevator up to the second floor to use the restroom. According to Williams, he rode up the elevator with Lyn and she was crying.[9] Williams testified that Lyn said she did not have money to buy food for her baby. Although Williams seemed to indicate that he had some discussion with Lyn regarding employees not being paid, his testimony in this regard was not entirely clear. [Tr. 84, 87, 202, 499]

Williams claims he went back outside and spoke with other employees who asked him whether he saw Cherry with the paychecks. Williams told them he had not. According to

[8] According to Wright, she obtained these checks from the bank the morning she testified. Wright testified that she requested more checks, but was told by the bank that this was the most she could receive. [Tr. 375-379]

[9] Williams initially identified this woman as Debbie Watson. The Respondent subsequently called Lyn as a witness. On rebuttal, Williams testified that Lyn was the Debbie he spoke to in the elevator. [Tr. 498-499, 503]

Williams, some of the employees were angry and he too was angry because he had come so far from home and did not get his check. However, Williams testified that he was not angry enough to fight or to curse. [Tr. 88-90, 181]

According to Lyn, the events of November 18 proceeded much differently and she described them as follows: She arrived at work between 1:00 p.m. and 1:30 p.m. and saw Williams outside. He was alone, angry, walking back and forth in front of the door, and screaming loudly about not receiving his paycheck. Williams was screaming things like, "I want my check. I want my F-ing check. He was using curse words, saying that he wants his check and they better not play with his check." Williams also "said that he was going to get his knife, and he was going to go back in the building, and he was going to stab Ms. Cherry." Lyn asked Williams to lower his voice, walk to the side, and talk to her about it. However, Williams "kept going on" and said "he was going to go into the building, and he was going to handle business for himself." Lyn called Cherry and told her Williams was making her nervous because he was outside ranting, cursing, and very upset. Cherry told Lyn to do her best with Williams and ask him to come back later when she (Cherry) could take care of it. Lyn asked Williams to come back later or wait peacefully outside without yelling or screaming. Williams responded that he wanted to be paid now. Lyn felt threatened, but did not see Williams with a knife and did not call the police. Lyn explained, "[h]e is an elderly gentleman. I figured I could talk to him and maybe talk some sense into the matter. I knew he was upset about his check. So I . . . didn't really want to get him, you know, arrested just for being angry. Some people say things out of anger." [Tr. 357-361, 364, 369]

Cherry testified as follows with regard to the alleged events of November 18: She picked up the paychecks as usual at about 12:00 p.m. or 12:30 p.m. and rushed back for her weekly meeting at 1:30 p.m. with the DO & CO hygiene department. She did not see anybody waiting for their checks when she returned and proceeded straight to her meeting. After the meeting ended sometime after 2:00 p.m., Cherry went to the lobby and distributed the checks to about five or six morning shift employees who were waiting to be paid. Two of these employees told Cherry they heard Williams being loud in front of the building regarding his check. Cherry was of the impression that the two employees who told her this "were not eyewitness" to the incident, but heard rumors that "had already spread through the building." Cherry denied she received a call from Lyn. Rather, after speaking to employees, she went to the cafeteria and saw Lyn. Lyn asked Cherry whether Williams called her, and Cherry said he had not. Lyn told Cherry that Williams was outside arguing about his check. Upon further prompting, Cherry testified that she heard that Williams used profanity and "I believe I heard about a knife" and "some threatening words." Cherry did not hear that Williams threatened to stab anyone and she did not report the matter to the police because Williams could have gotten in serious trouble and she had nothing against him. [Tr. 243-249, 296-297, 311-323]

Williams denied talking to Lyn anywhere other than in the elevator upon his arrival at the facility and denied that he cursed at or threatened anyone. [Tr. 181, 505]

According to Williams, after he used the restroom and left the building on November 18, he went to sit with two employees of DO & CO who were on break smoking cigarettes. [Tr. 96-97] At about 6:30 p.m. or 7:00 pm, Williams allegedly saw a Savera supervisor he knew as "Gary" and called Gary over. [Tr. 101-102] At trial, "Gary" was identified as Savera overnight supervisor Earl Mellad (Cherry's husband). Earl testified that he sometimes goes by the name of "Gary" because he is "just more comfortable with that name than Earl." Earl and Cherry are

married, they cohabitate, and have children. Nevertheless, Cherry testified that Earl is not known as "Gary" or any name other than Earl.[10] [Tr. 95, 154, 252, 473-474]

By the time Williams allegedly saw Earl walking to his car, the DO & CO employees had left and Williams was alone.[11] Williams described the alleged conversation as follows: Williams asked, "we're not getting no pay today?" Earl said he was trying to get to the bottom of that. Williams said he did not "want to hear about no bottom of things," he wanted "to know if we're going to get paid."[12] [Tr. 102] Williams testified that he "started to tell him my mind now" and described his comments to Earl as follows [Tr. 102]:

> I said now listen. When DO & CO workers come out our -- any hours they come off, they just go off front just to collect their money. And I say we inside there doing the dirty work. I work the hardest. . . . So we are not keeping here where should I just get paid just like DO & CO workers, but if we strike then the whole place have to shut down. . . . So it's reasonable for us to don't treated like that.

Ultimately, according to Williams, Earl said okay, it is finished, "the boss have plenty more line who can do the work who are leave, leave." Williams responded that he was "not talking about leave," he was "just talking about our money." [Tr. 103] Williams allegedly told Earl if Trisha, a DO & CO manager, did not give money to Harrington, Harrington "can't pay us" and "we are living off from paycheck to paycheck." Williams said he has to tell his landlord he did not get paid and she feels he is a cheater. Earl said again that they were finished because Williams was talking "hard" to him. Williams told Earl he was not talking hard, he was just telling him the truth. Earl then went to his car and left. Williams went to the bus stop and left to go home. According to Williams, this conversation lasted about five to ten minutes. [Tr. 103-105, 111]

Earl denied having this conversation with Williams, testifying as follows [Tr. 475-476]:

> Q Okay. Now I'm just going to move forward to the date of November 18th. Were you working that day? It was a Friday.
>
> A No.
>
> Q Okay, so --
>
> A Fridays -- Fridays are my off days.
>
> Q Okay. So did you, by any chance, happen to come to the Do and Co building that day?

[10] While it is not impossible that Cherry was unaware that the husband she lives and works with goes by the name of "Gary" (even though Williams had little to do with Earl at work and still knew him as Gary), it is far more likely that she denied Earl goes by Gary as a way of denying that Williams spoke to Earl.

[11] At trial, Williams had an extremely difficult time articulating where he had the conversation with Earl. Ultimately, Williams seemed to say that he walked right upon leaving the DO & CO building and then walked along the sidewalk to the corner. It was there that he saw Earl and called him over.

[12] Williams has a fairly thick accent and his manner of speaking could at times be quite difficult to understand. Cherry testified that Williams is Jamaican. [Tr. 235]

A No, sir.

Q Okay. And by any chance, did you have any conversations with Mr. Williams on that day?

A No, I did not.

Q Okay. Well, what about the day before, let's say, on the 17th? Did you have a conversation with Mr. Williams?

A No, I did not, sir.

The Respondents introduced into evidence a document which indicates that Earl worked on Thursday, November 17 from 9:04 p.m. (clock in) to 5:13 a.m. (clock out) and then on Sunday, November 20 from 8:40 p.m. (clock In) to 5:02 a.m. (clock out). [R 7] This document does not indicate that Earl worked on November 18.

In the affidavit Cherry provided during the Regional investigation of this case, she stated as follows in paragraphs 15 and 16 [GC 7]:

15. On Friday, November 18, I was in the building but in a meeting with DO & CO. I came out of the meeting about.2:00 or 2:30 and I heard from a Savera supervisor and another maintenance worker that Williams had had an altercation in the front of the building. Everyone was talking about it. What I heard was that he was arguing about his check - yelling because he had not received it - and was using profanity in front of the building. I did not hear that he directed his yelling at any particular supervisor but I did hear he yelled at a supervisor named Debbie when she tried to calm him down. She told him to call me and he just kept yelling. I don't know what upset him that day. I am not aware of any Gary that works in the building. When I came out of the meeting Mr. Williams had already left the building.

16. So I called him and asked him why he didn't call me to talk about the check. His shift starts at 5 am so he finishes earlier than other employees. I try to make sure the checks are there by 12 pm so I can give them out to everybody but on this particular day, I was in a meeting. I asked him why he didn't call me instead of making a scene in front of the building. He got loud and told me that he knew his rights. I asked if he was going to take the pot washer transporter/runner position. He used a Jamaican curse word and he yelling and screaming that he knew his rights. I told him that he did not need to yell, and asked again if he was going to take the position. He kept yelling. I told him I had the checks, why didn't he just call me? He kept quarreling and arguing. I told him that it was easy for him to ask me or call me like he always did. He said, "I'm older than you, you don't tell me what to do, I act how I chose to." He was screaming and yelling so I ended the conversation.

At trial, Cherry did not testify that she called Williams on November 18.

On Sunday night, November 20, Cherry did call Williams. Williams testified that Cherry called around midnight and they spoke for about five minutes. [Tr. 166] However, the record contains phone records which show a call from Cherry to Williams on November 20 at 9:26 p.m. that lasted 31 minutes. [GC 36] The substance of this call is significantly contested, with Williams describing the conversation as follows: Cherry told him she understood he was cursing and behaving rowdy at the building on Friday. Williams denied this and told Cherry

about his conversation with Earl (apparently thinking it was his conversation with Earl she was referring to). Cherry put Earl on the phone and Earl told Williams he was fired. Earl also said Williams would be arrested if he was seen back at the building. Williams said to Earl, "God bless you," and Earl responded in kind.[13] [Tr. 114-116, 165-168, 192]

Cherry testified that she called Williams Sunday night from home because she was making the schedule and wanted to offer him the runner position again. Cherry described the call with Williams as follows [Tr. 249-252, 293, 329-331]: She asked him about the outburst that happened on Friday, and he denied having an outburst. Cherry said people "are talking around the building saying you were in the front using profanity, obscene language, cursing and all these other things" and "you know those things are not acceptable." Williams said he came to pick up his check and no one had it. Cherry told him he should have called her and that Lyn told him she (Cherry) was in a meeting. Cherry also told Williams she was making the schedule for Monday and wanted to offer him the runner position. Cherry said "you know, they complaining in the department that you're a bit slow and that you're holding --- most of the times, you tend to hold up production." Williams declined the runner position, but Cherry attempted to convince him it would be better. She said he did not have to deal with the hot water which was hurting a bruise on his finger and he just had to move dishes back and forth from one section to another. Cherry also said he did not have to come to work so early because the hours were 8:00 a.m. to 4:00 p.m. Williams did not like those hours and continued to decline the runner position. Ultimately, Williams told Cherry he knows his rights. Cherry told Williams not to come in to work on Monday and to hold off on showing up until further notice. Although the following testimony was not entirely clear, Cherry indicated that Williams believed he was being fired (even though she did not tell him he was fired) [Tr. 331-332]:

> Judge Green: What did he say about his rights?
>
> The Witness: He said he knew his rights –
>
> Judge Green: Okay, but he didn't say –
>
> The Witness: -- because we fired -- I mean, we fired -- I mean, if I -- I did not say he was fired.

Cherry and Earl testified that Earl was at work on the evening of November 20 and did not participate in the call. As noted above, the Respondents' records show Earl clocking in for work at 8:40 p.m. and clocking out at 5:02 a.m., while phone records reflect a 31 minute call from Cherry to Williams at 9:26 p.m. [Tr. 249-252, 476] [R 7]

Earl was not Williams' supervisor. [Tr. 167, 476]

On November 21, Cherry called Harrington, who was busy working and had little time to talk. Cherry told Harrington there was an incident at work involving an outburst by Williams regarding his paycheck. Cherry also claims she told Harrington she offered Williams the runner

[13] For reasons described in the Analysis section of this decision, I do not credit Williams' testimony that he spoke to Earl on this call. However, I do not entirely credit Cherry's testimony either as it significantly differs from the description in her affidavit of what she told Williams over the phone. In particular, her affidavit indicates that the conversation focused more on Williams' complaints about his pay and less on moving Williams to the runner position (although I do find that they discussed both issues).

position, but Williams declined the job and she directed him not to return to work until further notice. Cherry admits she never told Williams he would be terminated if he did not accept the runner position. [Tr. 296-301, 306]

Harrington did not corroborate Cherry's testimony, in significant parts, regarding their conversation on November 21. Harrington recalled Cherry telling him there was a "situation," "incident," or "issue" involving Williams "and there was profanities, and threats, . . ." Harrington also testified that Cherry told him Williams was upset about not receiving his check. Harrington did not decide to fire Williams and told Cherry to "just call [Williams] up and just fix it. Get him back to work." Harrington testified that he only had one conversation with Cherry about offering Williams the runner position and this conversation occurred a week or two before Williams left the company. Although Harrington testified that he would currently prefer Williams to return as a runner if he were taken "back right now," Harrington was quite adamant that he did not consider terminating Williams from the pot wash position if he did not accept the runner position in November. When Harrington was asked whether he discussed with Cherry whether to terminate Williams from the pot wash position, he responded, "No. No. The -- the word termination or firing Mr. Williams, never, ever came into the conversation." [Tr. 431, 434-439, 464-467]

Later on November 21 (after Cherry spoke to Harrington), Williams went to DO & CO to pick up his paycheck. Williams testified that he was afraid to enter the building because Earl had threatened him with arrest. Therefore, he called and asked for Cherry, who came to bring him upstairs. Williams told Cherry he was supposed to get notice and two extra weeks of pay, but she said no. Williams said he would go to the Labor Board, and Cherry said he could do what he wanted. Cherry hugged him and they both indicated that they had nothing against each other. [Tr. 116-119, 182-187]

Cherry initially admitted that Williams came to pick up a paycheck on November 21, but later testified that she believed Williams' friend picked up his last two checks. [Tr. 341] Cherry testified that she recalled seeing Williams one time during the week of November 21 when he came to clean out his locker and gave her his pot wash glove.[14] Cherry denies that Williams ever asked for additional money. [Tr. 253-255, 301-306, 341]

Williams testified that he went to the DO & CO facility to pick up his last paycheck on Friday, November 25. [Tr. 119, 131]

During the investigation of this case, Harrington provided a letter to the Region which stated, "Mr. Williams' services were no longer needed and he was terminated on November 20, 2016." [Tr. 469] [GC 9(b)]

[14] Cherry was not sure whether Williams came in before or after she spoke to Harrington of the incident on November 18, but I find that Williams came in after that conversation. On November 21, Cherry did not tell Harrington that Williams had come in to clean out his locker and Harrington directed Cherry to bring Williams back to work. Cherry only told Harrington that Williams cleaned out his locker in a subsequent call later that week. It stands to reason that Williams had not come in to clean out his locker when Cherry talked to Harrington the first time on November 21.

Analysis

8(a)(1) Discharge of Williams

The General Counsel's Prima Facie Case

The General Counsel contends that the Respondents violated Section 8(a)(1) of the Act by discharging Williams because of his protected concerted activity. More specifically, the General Counsel asserts that Williams was unlawfully discharged because he raised protected concerted complaints about the Respondents' failure to pay employees on time. See, e.g., *Approved Electric Corp.*, 356 NLRB 238 (2010) (employees unlawfully discharged for complaining about not being paid for work they had performed).

The Board applies the analytical framework set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982) to determine whether an employer unlawfully discharged an employee for protected concerted activity. *Approved Electric Corp.*, 356 NLRB 238 (2010). As explained by the Board in *Approved Electric*, "[u]nder *Wright Line*, the General Counsel has the initial burden to prove that the employees' Section 7 activity was a substantial or motivating factor in the discharges. The elements commonly required to support the General Counsel's initial showing are union or protected concerted activity by the employees, employer knowledge of that activity, and animus on the part of the employer. See, e.g., *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). If the General Counsel makes the required initial showing, the burden shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action even in the absence of the union or protected concerted activity. See *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), affd. 127 F.3d 34 (5th Cir. 1997)." *Id.*

Preliminarily, I find that the Respondents have been late in paying employees and that employees have expressed unhappiness about the same to management. For this determination, I rely significantly on the testimony of Paul, who no longer works for Respondent Savera and has nothing to gain from this proceeding. Although it could be argued that Paul had an ax to grind because she was terminated, it was not my impression that she was testifying falsely out of vindictiveness. Rather, Paul impressed me as an honest and outspoken witness who testified fairly in response to all questioning (regardless of the source), and she was corroborated by Williams.[15]

I also credit Williams regarding his conversation with Earl on November 18. The testimony of Williams and Earl regarding this conversation could not have been more different. Williams had tremendous difficulty explaining where the conversation took place and (perhaps in part because of his manner of speaking English) portions of his description were hard to understand. Nevertheless, Williams recounted throughout his testimony a detailed and consistent explanation of the conversation which appeared spontaneous, adamant and truthful.[16] For his part, Earl was perfectly clear in his brief testimony that he did not go to the facility on Friday, November 18, and a clock-in/clock-out sheet confirms that he did not work that

[15] Paychecks and bank records for the period from September to November do indicate that paychecks were cut by the bank on Fridays, but this does not mean Cherry always picked them up on Friday or that the checks were always issued by the bank on Friday before September.

[16] I also note that this conversation is not of a type that an unrepresented lay person would necessarily know to invent if he were inclined to manufacture testimony. Certainly, Williams may have known the legal significance of this conversation, but the legal significance is not entirely obvious.

day. However, the fact that Earl did not work does not foreclose the possibility that he was at the facility (where his wife happens to work), and Earl was not asked about his whereabouts on November 18. Thus, it is difficult to test the depth and accuracy of his recollection as to the events of that day. This would be less of a concern if Earl were asked whether he had any recollection of *ever* talking to Williams about employee pay (whereas here, Earl was only asked whether he spoke to Williams on November 17 and 18). Ultimately, while there was nothing perceptibly false about Earl's brief testimony, Williams offered the more credible and convincing testimony between the two.

Given my factual findings and evaluation of the record as a whole, I conclude that the Respondents discharged Williams because he engaged in protected concerted activities. The record does contain some uncontested evidence that the Respondents harbored animus toward employees who engaged in protected concerted activities. Harrington testified that Paul was discharged for objecting to a supervisor's admonishment of the staff for being late back to the floor from break and noted that the issue did not involve Paul because she worked upstairs. However, employees engage in protected concerted activity when they speak on behalf of a coworker even though they themselves may not have a personal stake in the matter.[17] Cherry also admonished Williams on one occasion because, in part, he spoke out in front of other employees in response to critical comments by a supervisor about staying too long on break. Thus, the Respondents reacted in a negative way to employee conduct that occurred concertedly in groups or at least had the potential to involve other employees.

The events that lead to the separation of Williams indicate that he was discharged on the basis of such animus and a discriminatory motive. On November 18, according to Cherry, she learned that Williams complained about not receiving his check from other employees and that this rumor spread around the building. As noted in her affidavit, Cherry told Williams he should have called her instead of "making a scene in front of the building" (suggesting that Williams was free to raise concerns about his check on individual basis, but not publicly). When Williams complained to Earl about the Respondents' failure to pay all employees on time, Earl accused Williams of talking "hard" to him and suggested that Williams could be replaced. That Williams' complained publicly about his check and spoke up on behalf of other employees is conduct of a type that, we have reason to believe, the Respondents would and did find objectionable. Moreover, that timing of Williams' discharge, shortly after he engaged in such arguable protected concerted activity, is evidence of a discriminatory motive. See, e.g., *Bronx Metal Polishing Co.*, 268 NLRB 887, 891 (1984).

The Respondents' current explanation of the cessation of Williams' employment is also inconsistent with past rational, significantly perplexing, and seeks to minimize the issue of Williams' paychecks in a way that does not conform to the evidence. During the Regional investigation, Harrington explained that "Mr. Williams' services were no longer needed and he was terminated on November 20, 2016." At trial, Cherry testified that, on November 20, she offered to retain him as a runner. And although Cherry testified that she called Williams about the runner position on November 20, Williams had already rejected that job and her first order of business was to ask him about the issue of his pay. Cherry stated in her affidavit, "I called him

[17] The Board has quoted with approval the decision of Judge Learned Hand, who stated as follows: "When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a 'concerted activity' for 'mutual aid or protection,' although the aggrieved workman is the only one of them who has any immediate stake in the outcome." *Unique Personnel Consultants, Inc.*, 364 NLRB No. 112 (Aug. 26, 2016) quoting *Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505-506 (2d Cir. 1942).

and asked him why he didn't call me to talk about his check." Cherry also failed to indicate in her affidavit that that the conversation ended with her telling Williams he should not come back to work if he was unwilling to accept the runner position. Rather, Cherry indicated in her affidavit that she ended the conversation because Williams kept arguing with her about whether he should have called her regarding his check.[18] In fact, Cherry admitted at trial that she never told Williams he would be laid off if he did not accept the position of runner.

Indeed, the notion that Cherry suddenly determined on November 20 that Williams could not return to work unless he moved to the runner position makes little sense. Cherry asked Williams about moving from pot wash to runner a month earlier and, when he refused, was not inclined to force him into the new position. The Respondents were admittedly reluctant to terminate employees and were particularly patient with Williams despite the severe misconduct in which, they claim, he allegedly engaged. Nothing happened from October to November 20 that would suggest there was any urgency to remove Williams from the pot wash position and discharge him if he did not accept the position of runner. However, on November 18, Williams did complain publicly about the Respondents failure to pay employees on time and Cherry took issue with this conduct in her conversation with him on November 20. I find it much more likely that Williams was removed from work because of these complaints than because he was unwilling to become a runner.

Importantly, Harrington did not corroborate Cherry's testimony that she told him she directed Williams not to come to work because he was too slow as a pot washer and rejected the runner position. According to Harrington, Cherry told him there was an incident with Williams and that Williams was upset about not receiving his check. Harrington further testified that he only had one conversation with Cherry about offering Williams the runner position and this conversation occurred a week or two before Williams left the company. Certainly, on November 21, Harrington did not authorize Cherry to discharge Williams from the pot wash position because he rejected the runner position (if they talked about the runner position at all). Rather, Harrington directed Cherry to "just call [Williams] up" and "get him back to work."[19] According to Harrington, Williams was one of his best employees.[20]

It is also clear that Williams did not quit, as the Respondents now claim. Williams clearly wanted to continue working for the Respondents as a pot washer. Cherry testified that she told Williams on, November 20, not to return to work until further notice and, thereafter, never notified him that he was free to return. Interestingly, Cherry did not actually state in her affidavit that she expressly told Williams not to come to work. However, Cherry did testify that Williams thought (incorrectly) he was being fired. Whether Cherry expressly directed Williams not to come to work or simply failed to correct Williams' impression that he was being fired, it was

[18] While I find that Cherry did offer Williams the runner position on November 20, such a finding does not contradict my conclusion that she discharged him unlawfully. It is entirely possible that Cherry offered Williams the runner position because he had rejected it before and his rejection of it again would provide a pretext for dismissing him. Regardless, that Cherry offered Williams the runner position does not negate a finding that she was upset with him about his protected concerted activity and ultimately refused to return him to work (as Harrington directed) for that reason.

[19] Harrington specifically moved Williams from Respondent Savera to Respondent Industrial so Williams could not be discharged by the account manager of Respondent Savera. Only Harrington could fire Williams and, on November 21, Cherry was clearly told by Harrington that he did not want to do so.

[20] Although Harrington testified that he would *currently* prefer to rehire Williams now as a runner instead of a pot washer, his testimony in this regard is irrelevant to an analysis of the Respondents' actual treatment of Williams in November.

clearly her understanding that Williams should not return to work unless she told him otherwise (which she did not do). Accordingly, the Respondent's current assertion that Williams voluntarily resigned on his own accord is entirely at odds with the reality of these events.

Ultimately, along with other evidence discussed above, the Respondents' inconsistent and illogical explanations of events, which strain a fair reading of the record, support the General Counsel's assertion that they were "grasping for reasons to justify" the discriminatory discharge of Williams. *Meaden Screw Products, Co.*, 336 NLRB 298, 302 (201). See also *Approved Electric Corp.*, 356 NLRB 238, 239-40 (2010); *Goodman Forext Industries*, 299 NLRB 49, 54 (1990).

Nevertheless, I must still determine whether Williams' was discharged for conduct that, according to the Respondents, lost any arguable protection and was not, in fact, concerted.

First, I find that Williams was not discharged because he engaged in conduct that lost the protection of the Act under *Atlantic Steel Co.*, 245 NLRB 814 (1979). Cherry did not take seriously any alleged vulgarity or threats Williams may have uttered on November 18 and did not consider it a basis for disciplining or discharging him. Cherry and Harrington both testified that Williams was not fired for any such misconduct and, on November 20, Cherry offered him the position of runner. The Respondents cannot defend against the allegation of an unlawful discharge by seeking to retroactively capitalize on arguably unprotected misconduct which was not, in fact, the basis for the discharge. *Starbucks Corp.*, 360 NLRB 1168 (2014).

The next question – and a much more difficult one - is whether Williams was discharged for concerted activity. The Board has held that the conduct of a single employee can constitute concerted activity within the meaning of Section 7 of the Act. *Meyers Industries*, 281 NLRB 882, 885-886 (1986) (*Meyers II*) affg 268 NLRB 493 (1984) (*Meyers I*), and overruling *Alleluia Cushion Co.*, 221 NLRB 999 (1975).[21] Ultimately, "the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence." *Id.* In both *Meyers* decisions, the Board indicated that a finding of concerted activity would generally "require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, "[i]t is not essential to a finding of concerted activity that employees formally agree to act as a group." *Approved Electric Corp.*, 356 NLRB 238 (2010). In *Meyers II*, the Board confirmed that conduct is concerted "where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." 281 NLRB at 887. The Board has since clarified that wage-related complaints are "inherently concerted" and do not require any contemplation of group action to be found concerted. See e.g., *Alternative Energy Applications, Inc.,* 361 NLRTB No. 139, n.10 (Dec. 16, 2014).

In *Mannington Mills*, 272 NLRB 176 (1984) the Board found that an employee was not engaged in concerted activity when he threatened a group work stoppage because "there was

[21] According to the Board in *Meyers I*, under the *Alleluia* line of cases, an employee is engaged in concerted activity where he/she individually raises an issue which *ought* to be a matter of group concern without "looking at the observable evidence of group action to see what men and women in the workplace in fact chose as an issue about which to take some action . . . ." *Meyers I*, 268 NLRB at 495. While the General Counsel must establish that an issue is more than just a theoretical concern to an employer's work force, activity will be considered concerted where, for example, a "policy triggered numerous questions among both employees and managers . . . ." *Hitachi Capital America Corp.*, 361 NLRB 123 (2014).

not even a general awareness on the part of the group as to the intended action of the individual employee." However, the General Counsel need not establish that an alleged discriminatee engaged in prior concerted activity if the evidence establishes that a discharge was "a pre-emptive strike to prevent [him/her] from engaging in activity protected by the Act" which may occur in the future. *Perexel International, LLC*, 356 NLRB 516, 517 (2011).

Applying Board precedent, I find that Williams engaged in concerted activities. In the past, employees had expressed dissatisfaction with the Respondents' failure to pay them on time. Williams did not merely raise a theoretical problem that ought to concern employees, but echoed previous complaints by other employees. For her part, Cherry appeared to focus on the public and group nature of Williams comments in noting that he should have called her individually instead of "making a scene" that "spread through the building." Further, in his comments to Earl, Williams used the plural pronouns of "we" and "us" in objecting to the treatment of all employees. See *Hitachi Capital America Corp.*, 361 NLRB 123 (2014). Accordingly, I find that Williams' conduct was concerted and, for reasons discussed above, was discharged on that basis.

The evidence also supports a finding that the Respondents discharged Williams, in part, because he raised the prospect that employees might engage in protected concerted activity in the future. Williams told Earl, "if we strike then the whole place have to shut down."[22] Comments by Cherry to Paul and the testimony of Harrington suggest that the Respondents maintained a degree of animus toward and would not readily suffer the prospect of such protected concerted activity. *Perexel International, LLC*, 356 NLRB 516, 517 (2011).[23] Williams was discharged shortly after he raised the prospect of a group work stoppage, and the Respondents did so upon stated reasons that have proven to be shifting, inconsistent and pretextual. Accordingly, I find that the Respondents were at least partially motived to terminate Williams' employment in order to avoid the possibility that he and other employees might engage in protected concerted protected activities in the future.

Thus, in sum, the totality of the evidence suggests that the Respondents discharged Williams because he publicly complained about not receiving his paycheck (which was the subject of complaints by other employees and, in Cherry's words, "spread around the building"), he objected to untimely payment on behalf of all employees (not just himself), and the Respondents were not inclined to tolerate any concerted activity (i.e., a work stoppage) by employees in the future.

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[22] In light of the Board's holdings in *Mannington Mills*, I cannot conclude that Williams' comment about a prospective strike was authorized or such an outgrowth of employee concerns as to be concerted. There is no evidence that employees ever discussed a possible work stoppage. However, as noted above, a violation may be found (regardless of any prior concerted activity) where the evidence indicates that an employer has acted to avoid concerted activity in the future. *Perexel International, LLC*, 356 NLRB 516, 517 (2011).

[23] Although the General Counsel did not raise the "preemptive strike theory," the theory is closely connected to the subject matter of the complaint and was fully litigated. See *DirectSat USA,* LLC, 366 NLRB No. 40 (Mar. 20, 2018). The complaint alleges that Williams was discharged on the basis of protected concerted activity and *Perexel* merely distinguishes between past and prospective activity. The General Counsel's case was significantly based on Williams' conversation with Earl and the Respondents reaction to it, while a theory based on *Perexel* revolves around the same facts. Finally, the finding of a violation is not exclusively based on a preemptive strike theory, but also encompasses a finding that the Respondents discharged Williams because of the public and concerted nature of his complaints.

The Respondents' *Wright Line* Defense

The Respondents have failed to establish a *Wright Line* defense. Harrington stated in a letter, during the investigation, that Williams' "services were no longer needed and he was terminated on November 20, 2016." The Respondents now claim that Williams was removed from the pot wash position and voluntarily resigned instead of accepting the position of runner. The Respondents' failure to offer a consistent position not only suggests a discriminatory motive, but undermines their *Wright Line* defense.

Even if I were to find that the Harrington's letter to the Region was simply a vague summary of events that was not artfully drafted, I would still conclude that the Respondents did not establish a defense under *Wright Line*. As discussed in the previous section of this Analysis, the evidence does not establish that the Respondents actually removed Williams from the position of pot washer and condition the continuation of his employment upon his acceptance of the runner position. Cherry did not inform Williams he could not return to work *because* he did not accept the runner position and her conversation with him on November 20 largely concerned the issue of his pay. Cherry did not communicate to Harrington that Williams would be discharged from the pot wash position if he did not become a runner and Harrington did not authorize such a course of action. Rather, Harrington specifically told Cherry to bring Williams back to work. Accordingly, the premise of the Respondents' *Wright Line* defense is pretextual.

It is equally unreasonable to interpret Williams' separation as a voluntary resignation. Williams clearly wanted to remain employed by the Respondents as a pot washer. Cherry either told Williams not to return to work until further notice or was simply aware that Williams (because he said so) thought he was being fired. Regardless, on November 20, Cherry knew that Williams would not be reporting for work and did not tell him he could return to work even though Harrington directed her to do so.

A fair reading of the record tells a different story than the Respondents have asserted in support of their defense. The evidence indicates that Cherry was unhappy with Williams' conduct on November 18 to the extent he was publicly complaining (including to Earl) about the Respondents' failure to pay employees on time. On November 20, Cherry repeatedly told Williams he should have called her directly about his paycheck instead of making a scene. Although Cherry did ask Williams whether he was willing to take the runner position, there was no contemplation or discussion of discharging him from the pot wash position if he did not agree to become a runner.[24] Further, Williams did not quit. Cherry allowed Williams to collect his last two checks and walk out with his belongings despite Harrington's explicit direction that she return him to work. In doing so, the Respondents effectively discharged Williams and they did so in violation of Section 8(a)(1) of the Act because he engaged in protected concerted activities and because they were concerned about such conduct by employees in the future.

[24] Although Williams did testify that he was offered reinstatement shortly before trial, I do not find that relevant to the discharge allegation. I have not addressed, separately from the discharge, the allegation that the Respondents unlawfully refused to reinstate Williams because of his protected concerted activities. The issue of reinstatement is largely a remedial matter for compliance and can be addressed in such a proceeding.

8(a)(1) Threat to Report Williams to the Police

The General Counsel contends that, on November 20, Earl unlawfully threatened to call the police if Williams came to the facility because Williams had engaged in protected concerted activity. However, I do not credit Williams with regard to this alleged conversation and will dismiss the allegation.

According to Williams, on November 20, Earl took the phone from Cherry and told Williams he was fired and would be arrested if he returned to the facility. Harrington did confirm during the Regional investigation that "Mr. Williams' services were no longer needed and he was terminated on November 20, 2016." This tends to support Williams' testimony that he was fired by Earl on November 20. However, Harrington's representation that Williams was terminated could have been a reference to the conduct of Cherry instead of Earl.

Despite Harrington's letter to the Region regarding the termination of Williams, I find that a number of factors weigh against crediting Williams' testimony that he spoke to Earl on November 20. First, according to Williams, Cherry called him at about midnight and they talked for about five minutes. Williams provided a description of the call that reflected a brief conversation. However, we know from phone records that Cherry called Williams at 9:26 p.m. and the call lasted 31 minutes. Cherry's testimony of the conversation is more credible in the sense that she described a more lengthy conversation.

Second, Williams appeared less assured in his testimony regarding the November 20 call than in his testimony (which I credit) regarding his conversation with Earl on November 18. In my opinion, there was a noticeable hesitance in Williams' testimony when he was describing the call on November 20.

Third, the Respondents produced clock-in/clock-out records which indicate that Earl worked on the evening of November 20. While it is possible that Cherry was actually at work instead of at home (she was admittedly working on the schedule) or that Earl came home on a break, it is more likely that Earl was not present and did not participate in the call.

Fourth, it would not make much sense for Cherry to ask Earl to fire Williams. Cherry is the highest manager for Respondent Savera at the DO & CO facility and Williams reported to her. Williams does not report to Earl. While it is possible that Cherry deferred to Earl because he talked to Williams on November 18, it still seems unlikely.

Finally, I could see how a person who was claiming to have been unlawfully discharged might feel compelled to testify that he was expressly told that he was "fired" and banned from the building. An employee might also be inclined to attribute the comments to a supervisor, such as Earl, with whom he recently had an argument.

Based on the totality of the record evidence, I do not credit Williams' testimony that he spoke to Earl on November 20, and I will dismiss the allegation that Earl unlawfully threatened Williams with arrest.

Conclusions of Law

1. Savera Industries, Inc., Superior Building Services, Inc. D/B/A Savera Industries, Inc., and Superior Cleaning Services D/B/A Savera Industries, Inc. (Respondent Savera) constitute a single employer within the meaning of the Act and Respondent Savera is a joint employer with Industrial Steam Cleaning of Long Island (Respondent Industrial).

2. Respondent Savera and Respondent Industrial (the Respondents) are each employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Respondents violated Section 8(a)(1) of the Act by discharging Pervis Williams because of his protected concerted activities and to preemptively prevent employees from engaging in protected concerted activities in the future.

The Remedy

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, which shall include posting the attached notice to employees marked "Appendix." If the Respondents are prevented from posting the notice at the facility involved in these proceedings, the Respondents shall mail the notice to all current employees and former employees employed by the Respondents at any time since November 18, 2016.

Having concluded that the Respondents unlawfully discharged Pervis Williams on November 20, 2016, they must offer him reinstatement and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

The make whole remedy shall be computed in accordance with *F.W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Scoopers, Inc*., 364 NLRB No. 93 (2016), the Respondents shall compensate Williams for his search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra., compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), the Respondent shall compensate Williams for the adverse tax consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondents shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 29 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

Order

Respondents Savera Industries, Inc., Superior Building Services, Inc. d/b/a Savera Industries, and Superior Cleaning Services d/b/a Savera Industries, of South Ozone Park, New

[25] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

York, and Respondent Industrial Steam Cleaning of Long Island, of Deer Park, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for engaging in protected concerted activities or to prevent employees from engaging in protected concerted activities in the future.

(b) In any like or related manner interfering, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Pervis Williams reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Pervis Williams whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(c) Compensate Pervis Williams for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

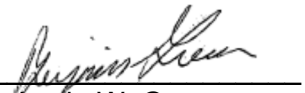
(e) Within 14 days after service by the Region, post at the Jamaica, New York DO & CO facility copies of the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondents have gone out of business or closed, or are otherwise prevented from posting the notice at the facility involved in these

[26] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since November 18, 2016.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., May 1, 2018
New York, N.Y.



Benjamin W. Green
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW UNDER SECTON 7 OF THE NATIONAL LABOR RELATIONS ACT GIVES YOU THE RIGHT TO
Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you for engaging in protected concerted activities or to prevent you from engaging in protected concerted activities in the future.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer full reinstatement to Pervis Williams to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Pervis Williams whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Pervis Williams for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and **WE WILL** file a report with the Social Security Administration allocating backpay to the appropriate quarters.

WE WILL, within 14 days from the date of this Order, remove from our files any and all references to the unlawful discharge of Pervis Williams, and **WE WILL**, within 3 days thereafter, notify him in writing that this has been done and that we will not use the discharge against him in any way.

SAVERA INDUSTRIES, INC., SUPERIOR BUILDING SERVICES, INC. D/B/A SAVERA INDUSTRIES, INC., SUPERIOR CLEANING SERVICES D/B/A SAVERA INDUSTRIES, INC., a Single Employer, and INDUSTRIAL STEAM CLEANING OF LONG ISLAND, a Joint Employer
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2 Metro Tech Center
100 Myrtle Avenue
5th Floor
Brooklyn, NY 11201-3838
Phone: 718-330-7713; Hours: 9 a.m. to 5:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29–CA–193068 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (718) 765-6190.